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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 522

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Petitioners*,

vs.

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW

These cases involve a pattern of conduct originating in *Rogers* v. *Westhoma*, 291 F.2d 726, rehearing denied 291

F.2d 732. Accordingly, the court's opinions in those cases are printed herein, Appendix A, p. A1. The United States District Court of Oklahoma for the Western District of Oklahoma at first refused to stay respondents' cases in an unreported letter order, which is printed herein, Appendix B, p. A17. The proceedings in the District Court Within and For Texas County, Oklahoma, printed in the Petition for Writ of Certiorari, were not presented to the Court of Appeals or made a part of the record before it. (See opinion of the Court of Appeals denying a motion to modify its opinion found at page 21a of the Appendix to the Petition for Certiorari.)

QUESTION PRESENTED

Respondents believe the question to be: Whether the United States Court of Appeals abuses its discretion to issue a writ of mandamus under 28 U.S.C. 1651(a) requiring a trial court within its jurisdiction to proceed and determine diversity cases properly before it where (1) none of the exceptional circumstances within which a trial court has discretion to invoke the "abstention doctrine" are present, and (2) a stay has been granted by the trial court at the request of the Federal court defendant based solely upon the existence of subsequently filed state litigation created by such defendant in a court of concurrent jurisdiction for the sole purpose of thwarting federal jurisdiction as a part of a continued and designed strategy of forum-shopping.[1]

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1. Respondents respectfully suggest that the footnote attached to the question as presented by petitioners (p. 4 of Petition) takes all meaning out of the question as stated in the text. Petitioners rely upon the very delay, of which respondents complain, which has been caused by the trial court stay, and which is continuing during the pendency of these proceedings, encouraging petitioners now repeatedly to assert throughout its Petition that a decision of the Supreme Court of Oklahoma is "imminent".

STATUTES INVOLVED

While there are no statutes, either Federal or State, which are pertinent to the merits of respondents' cases as presented in the trial court, respondents rely on the diversity statute, 28 U.S.C., Section 1332(a), as giving them the right to a trial in the district court and on the All Writs Act, 28 U.S.C., Section 1651(a), as affording them grounds for relief from the arbitrary trial court action depriving them of that right.

The applicable portions of the diversity statute, 28 U.S.C., Section 1332(a), provides, in part, as follows:

> "(a) The district courts shall have original jurisdiction of all actions where the matter in controversy . . . is between—
>
> (1) citizens of different states; . . ."

28 U.S.C., Section 1651(a), under which relief was granted by the Court of Appeals, provides in part:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

In August, 1961, respondents Otto G. Lutes and Florence Lutes, his wife, owners of a 160-acre farm tract in Texas County, Oklahoma, filed in the United States District Court for the Western District of Oklahoma an action against Westhoma Oil Company and others, who claimed the continued existence of an oil and gas lease contract owned by them insofar as it covered part of the land. (The complaint is set out in Appendix C, p. A19.)

Jurisdiction was admittedly properly based upon diversity of citizenship.

The contract was executed in January of 1943, and its primary ten year term expired in January of 1953. There has been at no time any oil or gas production or operations of any kind or character on that part of the land as to which defendants claim to have leasehold contractual rights. Defendants having, however, persisted in their claims long beyond the primary term, thus preventing development of such land by others, Mr. and Mrs. Lutes filed the action for a judicial determination that the lease contract interest of defendants had expired by its own terms.

Subsequently, the remainder of the respondents (in most instances also husband and wife), the owners of other 160-acre farm tracts in the same area, on various dates also filed similar but separate diversity cases against the same defendants in the same court, seeking similar relief.

The defendants, in each instance, claim that their contractual rights have been perpetuated beyond the primary 10-year term of the contract by reason of production secured by separate and other owners by assignment of the contract insofar and only insofar as it covered other parts of the respondents' lands.

As to such respective claims, the cases involve a determination of the *intent* of the parties to the contract as applied to existing factual situations.

The express contract provisions (from which such intent must be determined) and such existing factual situations are admittedly substantially identical to those in *Rogers* v. *Westhoma*, 291 F.2d 726, rehearing denied 291 F.2d 732 (10th Cir., 1961), which is reproduced in Appendix "A" herein pp. A1 to A16.

In those previous cases a number of landowners, similarly situated to respondents here, beginning about four years ago commenced in the state courts of Kansas similar separate actions against Westhoma and others. When such previous cases were filed, Westhoma and its co-defendants, not desiring to have the cases decided in state court, and not then believing that the cases involved "a basic problem of state policy beyond the special competence of the federal judiciary" (as now claimed, p. 8 of Petition) removed them to the United States District Court for the District of Kansas.[1] After three years of protracted and hard-fought litigation, in which twenty-eight prominent Oklahoma lawyers representing the interests of oil and gas lessees participated as amici curiae,[2] the landowners prevailed. As the result, their lands, by judicial decree, became free of the claims of Westhoma *et al.*, permitting such landowners to seek development from others.

But, in the face of the result[3] thus obtained in the forum of its choice in *Rogers* v. *Westhoma*, Westhoma and its co-owners failed to relinquish their claim as to that portion of a leasehold block which extended south across the Kansas-Oklahoma border. Nor did Westhoma and its associates, during the three-year pendency of the *Rogers* cases, file any suit to establish any asserted continuing contractual rights in such south portion of the block. These landowner actions resulted.

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1. 24 of the 27 cases involved in the Rogers cases were so removed. After and in the face of such successful removal by Westhoma of the 24 cases, the other 3 cases were filed by plaintiffs directly in federal court so that they could all be decided in the same forum. See *Rogers* v. *Westhoma, supra* (App. A, p. A1), and the opinion of the court below (App. A to Petition for Certiorari, pp. 2a-3a).

2. *Rogers* v. *Westhoma, supra* (App. A, p. A1).

3. An "accident of Federal jurisdiction" (p. 9 of Petition) procured by Westhoma itself.

As stated above, the additional actions of the respondents were brought by them in Westhoma's original choice of forum: the federal court. But Westhoma, having lost the removed suits in its chosen forum, suddenly decided that it might be better off in state court after all. So, after respondents began filing the additional various federal court cases, Westhoma found other landowners, residents of Oklahoma, against whom non-removable cases could be filed in the District Court within and for Texas County, Oklahoma. It there filed, as plaintiff, separate non-removable state court cases against such other landowners involving substantially the same fact situations as were involved in *Rogers* v. *Westhoma* and in the federal court cases previously filed by respondents.[1]

Having again successfully shopped for a new forum, Westhoma filed motions in respondents' federal court cases requesting that respondents' cases be stayed pending determination of its state court cases subsequently filed against others.[2]

At first, and after all state cases were filed, and on October 18, 1961, the trial court refused to condone such forum-shopping, explaining:

"The cases filed by defendants in the District Court of Texas County, Oklahoma were instituted sub-

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1. Respondents' separate actions were filed beginning August 30, 1961. Westhoma's first non-removable state actions were filed two weeks later, on September 14, 1961.

2. Westhoma's motions for stay were filed September 25, 1962. In such motions it stated that it intended to file additional non-removable cases. Westhoma later did file two such additional state court cases on October 12, 1961. One of these was against respondents Mr. and Mrs. Ostby S. Austin, who had previously (October 11) filed an action against Westhoma in federal court. With this single exception, none of respondents are parties to any state court cases.

> sequent to the suits in this court, and it is impossible to ascertain how long it will be before a final decision will be rendered in those cases in state court. As a general rule it takes much longer for a case to be finally decided in the state courts of this state than it does for a case to reach final decision in the federal courts sitting here. Furthermore, the defendants could have filed their suits in the courts of the State of Oklahoma any time after the cases were filed in Kansas which resulted in the decisions of Rogers v. Westhoma, 291 F.2d 726, but they did not choose to do so until the instant suits were filed. Although the defendants insist that the questions involved herein should be decided by a state court, the defendant Westhoma itself removed the Kansas cases to federal court from state court. Under the circumstances, it would not be fair or right for this court to stay these actions pending the outcome of the state court suits and thus enable the defendants to choose the forum when their apparent purpose, in view of Westhoma's choice of a federal forum in Kansas, is to speculate on a different decision from another court of concurrent jurisdiction. This is true particularly where the remedy in this court undoubtedly will result in a final determination in a fraction of the time necessary to obtain one in the state forum." (App. B, p. A18).

At the same time, the court consolidated the then-pending federal court cases for purposes of discovery, pre-trial and trial.

Defendants answered; pre-trial discovery was completed; a pre-trial conference was held on February 14, 1962, with resulting pre-trial order; counsel entered into a written stipulation concerning most of the factual questions and announced that they were ready for trial.

At the February, 1962, pre-trial conference counsel for defendants requested that their motions to stay be reconsidered.

By letter dated March 28, 1962, the trial judge reversed his decision and stayed all of respondents' cases, stating:

> "Upon consideration of defendants' motions to stay, I have come to the conclusion that under the doctrine of abstention and in the interest of comity between state and federal courts, I must exercise the discretion granted me by staying the proceedings in these cases until the question involved herein has been decided in the cases now pending in the courts of the State of Oklahoma, and decision thereon has become final. It is so ordered." (App. B to Petition, p. 9a).

This reversal of position occurred six months after the trial court's refusal to stay, and six weeks after counsel had announced they were ready for trial.

This mandamus proceeding was thereafter initiated on May 18, 1962, seeking to vacate the stay order to the end that respondents' cases could be heard and determined.[1]

After full hearing on briefs and oral arguments, in which the petitioners here appeared by and through counsel for defendant Westhoma and others (as they do in this court), the writ was granted on August 2, 1962, pursuant to written opinion, and the district court was directed to vacate its stay order and proceed with and determinate the causes. (Appendix A to Petition for Certiorari p. 1a).

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1. While these respondents' cases were stayed and at the time their mandamus proceedings were pending, and on June 13, 1962, the state trial judge entered judgment without opinion, in two state cases involving other landowners, the journal entry being filed July 2, 1962. The judgment shows no more than that the leases had not terminated as to the land in question. (See opinion of the Court below denying motion to modify opinion, p. 21a of Petition for Certiorari.)

Late in August, there was filed, on behalf of petitioners here, a motion to modify the opinion of the Court of Appeals, which was denied on September 11, 1962, pursuant to another opinion of the Court of Appeals. (Appendix D to Petition for Certiorari, p. 21a).

The cases were, by the trial court, set for trial in the middle of September, 1962, but petitioners having successfully sought stays of the issuance of the mandate of the Court of Appeals, pending the petition for writ of certiorari, the cases were taken off the trial docket.

Successive stays were granted by the Court of Appeals, the last stay extending until October 15, 1962, conditioned on filing a petition for writ of certiorari by that time.

The opinion of the court below (Appendix A, p. A1) sets out additional admitted facts germane to these proceedings as follows: the pending cases, both federal and state, present the same fact situation and the same lease form as were presented in *Rogers* v. *Westhoma;* the decisions in *Rogers* v. *Westhoma* were not based upon any Kansas statute or decision; there is no Oklahoma statute requiring or justifying a different decision; the Kansas and Oklahoma rules of oil and gas lease construction do not differ in any pertinent regards; Westhoma bluntly contends that the decision in *Rogers* v. *Westhoma* was wrong even under Kansas law; the issues do not present any federal or state constitutional or statutory questions; no public officials will be affected by the result. Petitioners stated in open court before the Court of Appeals that neither the decision in *Rogers* v. *Westhoma* nor the state court decisions will *assuredly* control the federal court cases which were stayed. (See opinion of Court of Appeals denying motion to modify, Appendix D to Petition for Certiorari, p. 21a.)

SUMMARY OF ARGUMENT

As clearly shown by the opinion of the Court of Appeals, its decision was obviously necessary under the All Writs Act, 28 U.S.C., Section 1651(a), to prevent a clear case of forum-shopping, and judicial abdication inconsistent with the proper administration of justice in any court. No federal questions of substance not heretofore determined are involved.

The Court of Appeals acted strictly in accord with applicable decisions of this court. *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959); *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943); *McClellan* v. *Carland*, 217 U.S. 280 (1910). See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and other cases cited in the opinion of the Court of Appeals (Appendix A to Petition, p. 6a).

In so doing it implemented the Federal policy favoring conformity in diversity cases. *King* v. *United Commercial Travelers*, 333 U.S. 153 (1948).

The decision is in harmony with *Mottolese* v. *Kaufman*, 176 F.2d 301 (2d Cir., 1949), and *Beiersdorf & Co.* v. *McGohey*, 187 F.2d 14 (2d Cir., 1951), upon which petitioners solely rely to create conflict among Circuits. To the extent they are similar, those cases also effectively prevented forum-shopping, the state cases there having been filed first.

Respondents are entitled to trial and not the delay contemplated by petitioners' reliance on *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942), which has no applicability to these proceedings, the trial court having twice fully explained its actions.

ARGUMENT AND AUTHORITIES

In issuing its writ the Court of Appeals was only doing what was obviously necessary under 28 U.S.C., Section 1651(a), in the light of aggravated circumstances occurring over a period of years with which it was peculiarly familiar. This is apparent from the Court's opinion. Accordingly, no federal questions of substance not heretofore determined are involved.

In so doing, the Court of Appeals acted strictly in accord with applicable decisions of this Court. *County of Allegheny* v. *Frank Mashuda*, 360 U.S. 185 (1959); *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943); *McClellan* v. *Carland*, 217 U.S. 280 (1910). See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and other cases cited in the opinion of the Court of Appeals (Appendix A to Petition, p. 6a).

When diversity jurisdiction was invoked by them, respondents were entitled to "that promptness of decision which in all judicial actions is one of the elements of justice", *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, pp. 196-197.[1] The doctrine of abstention, under which the trial court purported to act, is an "extraordinary and narrow" exception and abdication of the obligation to decide cases can be justified only in "exceptional circumstances". *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, pp. 188-189.

While admittedly the cases in which the trial court may so exercise its discretion are not subject to mathematical delineation, they must fall within some exceptional class

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1. Quoting from *Forsyth* v. *Hammond*, 166 U.S. 506, 513.

based upon "some recognized public policy or defined principle", *Meredith* v. *Winter Haven, supra*, p. 234.

The deliberate and calculated strategy of speculating on different decisions in different courts present here, having the sole effect of pitting court against court, and expedition against delay certainly does not fall within any such recognized public policy or defined principle.

Specifically, trial of respondents' cases would not "create needless friction by unnecessarily enjoining state officials from executing domestic policies"[1] as was present in *Arizona Public Service Comm.* v. *Southern Ry. Co.*, 341 U.S. 341 (1951), relied upon by petitioners. Nor does the case present a disputed interpretation of a state statute involving sovereign rights of the state as was present in *Louisiana Power and Light Co.* v. *Thibodaux*, 360 U.S. 25 (1959), upon which petitioners also rely.[2] Nor do these cases involve the exercise of jurisdiction by the federal court which "would disrupt a state administrative process",[3] as in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), cited by petitioners. Nor do they present a "federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law"[4] as was found in *Railroad Comm. of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), also relied upon by petitioners.

Nor do these cases involve the summary jurisdiction of the bankruptcy court to determine unsettled basic ques-

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1. *County of Allegheny* v. *Frank Mashuda Co., supra*, p. 189.

2. In addition, there the trial judge himself initiated the stay proceedings, "not at all in response to any alleged attempt" by a party to delay the proceedings, as present here. See footnote 2, p. 27 of opinion.

3. *County of Allegheny* v. *Frank Mashuda Co., supra*, p. 189.

4. *Ibid.*

tions of state land law involving "instruments of conveyance" as was found in *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 484 (1940), upon which petitioners principally rely.

In order to make that case appear to apply here, the petitioners found it necessary to paraphrase[1] the holding there in such a way as to make it directly inconsistent with the later holding of this court, specifically dealing with diversity jurisdiction, in *Meredith* v. *Winter Haven, supra*:

> "When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." (pp. 234-5) (See also that portion of the opinion quoted by the Court of Appeals, Appendix A to Petition, p. 6a)

These cases simply involve the expressed intent of the parties to an unusual lease contract[2] as applied to factual situations. In the sense used by petitioners in their paraphrase contract rights are always "private interests in local property".[3]

Nor does the opinion of the Court of Appeals ignore the federal policy favoring conformity in diversity cases, as enunciated in *Klaxton Co.* v. *Stentor Electric Mfg. Co.*

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1. The paraphrase is found in the first full paragraph of paragraph 9 of the petition. In quoting *Magnolia*, petitioners also omit, without indicating the omission, language describing the decisional conflict which resulted in the grant of certiorari. See *Magnolia* v. *Thompson, supra*, pp. 484, 481.

2. An oil and gas lease is a contract. See for example, *Beatty* v. *Baxter*, 208 Okla. 686, 258 P.2d 626, 628 (1953).

3. Oil and gas leases are personal property and not real property. See *State* v. *Shamblin*, 185 Okla. 126, 129, 90 P.2d 1053, 1055 (1939).

313 U.S. 487 (1941), and other cases on which petitioners rely.[1] Rather the decision implements that policy, which contemplates the exercise, not the abdication, of the trial court's jurisdiction. *King* v. *United Commercial Travelers*, 333 U.S. 153 (1948).[2]

Basically, the question before the Court of Appeals was whether the trial court may be permitted a wide and uncontrolled discretion to pick and choose the cases involving questions it desires to hear and those it would prefer to have decided by the Supreme Court of the state while federal litigants wait. To permit the federal trial court to stay cases such as these, involving only the interpretation of a contract because an identical contract had not been interpreted by the Supreme Court of the state would have had such effect, with a resultant encouragement of forum-shopping and jockeying for position in various courts. It

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1. Petitioners' concern for state law and for the avoidance of intrusion by the Federal judiciary into matters within the special competence of the state (p. 6) rings hollow in view of Westhoma's original invitation of such "intrusion" in the *Rogers* cases, coupled with its admission that *Rogers* was not based upon any peculiar state statute or decision, that there is no Oklahoma statute requiring or even justifying a different decision, and that Kansas and Oklahoma rules of oil and gas lease construction, which are controlling, do not differ in any pertinent regard. Westhoma desires a stay so that the Oklahoma Supreme Court may, in effect, exercise an appellate review of the decision of the Court of Appeals in *Rogers*. But the Supreme Court of the United States is the tribunal created and existing for that purpose, and Westhoma did not seek to review the *Rogers* cases in this court, although it now bases its whole case on the theory that *Rogers* was wrong, regardless of what law is applicable.

2. The inference apparently sought to be created by petitioners that the federal trial court would be bound by a decision of the district court within and for Texas County, Oklahoma, is wholly unwarranted. *King* v. *United Commercial Travelers*, *supra*.

takes little imagination, in many instances, for a federal diversity defendant to find a single issue in a case which might be determinative and on which there is no state supreme court decision precisely governing. With a little more imagination, such defendant could then file subsequent non-removable state actions in a local forum of his own choosing and, based thereon, secure a Federal stay, thus effectively depriving Federal plaintiffs of what Congress intended to give them.

Respondents respectfully suggest that the scheduling of cases for trial, argument and decisions should not be governed by considerations which inevitably result from such actions, and that the due administration of justice does not contemplate or permit the artificial pressures on parties and counsel created thereby.

There is no showing that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter. Indeed, the holding is fully in accord with the two Second Circuit cases on which petitioners rely. In both *Mottolese* v. *Kaufman*, 176 F.2d 301 (2d Cir., 1949) and *Beiersdorf & Co.* v. *McGohey*, 187 F.2d 14 (2d Cir., 1951), the state court cases were filed first and under circumstances where a state judgment would be either an estoppel or judgment in bar. To the extent that forum-shopping might have been present in such cases, the Second Circuit effectively prevented its abuse, just as the Tenth Circuit did here.

As to the petitioners' complaint that the lower court should be given another opportunity for a proper exercise of discretion, under the doctrine of *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942), the considerations mentioned by Justice Frankfurter have no applicability in these cases. The trial court has twice ruled on the matter, showed great familiarity with the circumstances, and de-

tailed in each instance its reasons. Under all of the facts, it was clearly right the first time and clearly wrong the second time. Respondents are entitled to a prompt trial, not to the further delay which could be the only result of petitioners' suggestion.

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

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